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No. 238

In the Supreme Court of the United States

October Term, 1964

WYCOFF COMPANY, INCORPORATED, *Appellant*

v.

PUBLIC SERVICE COMMISSION OF UTAH, ET AL., *Appellees.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

APPELLEE'S MOTION TO DISMISS THE APPEAL

A. PRATT KESLER,
Attorney General of Utah,

H. WRIGHT VOLKER,
Assistant Attorney General of Utah,

KEITH E. SOHM,
Commerce Attorney,

State Capitol,
Salt Lake City, Utah,

Attorneys for Appellees.

INDEX

	Page
MOTION	1
STATEMENT	1
THE QUESTION IS SO UNSUBSTANTIAL AS TO NOT NEED FURTHER ARGUMENT	6
CONCLUSION	14
APPENDIX A	15

CITATIONS

Cases:

Aero Mayflower Transit Co. v. Georgia Public Service Commission, et al., 295 U. S. 285, 79 L. Ed. 1439 12

American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 45 L. Ed. 102 13

Continental Baking Co. v. Woodring, 286 U. S. 371, 76 L. Ed. 1166 12

Hicklin v. Coney, 290 U. S. 175, 78 L. Ed. 251 12

McGowan v. Maryland, 366 U. S. 420, 6 L. Ed. 2d 393 13

Riley v. Lawson, 106 Fla. 521, 143 So. 619 12

Sproles v. Binford, 286 U. S. 374, 76 L. Ed. 1167 13

Smith v. Cahoon, 283 U. S. 553, 75 L. Ed. 1264 ..... 6, 7, 8, 9, 11, 12

Page

Constitution and Statutes:

Constitution of the United States:

Fourteenth Amendment (Equal Protection Clause) 6

Utah Code Annotated 1953:

Utah Motor Carrier Act, as amended, 6 U. C. A. 1953, 54-6-1, et seq. 2, 7

Section 54-6-1 2

Section 54-6-12 ..... 3, 7, 10, 11

Section 54-6-21 ..... 7, 10

Section 54-6-22 10

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MOTION

Appellee in the above entitled case moves to dismiss the appeal on the ground that the question presented is so unsubstantial as not to need further argument.

STATEMENT

Appellant in its Jurisdictional Statement correctly sets forth the opinions of the courts below, the jurisdiction of this court, the question presented, and the statute involved.

The Utah Motor Carrier Act, Volume 6, Sections 54-6-1 through 54-6-24, Utah Code Annotated 1953, as amended, provides for the regulation by the Public Service Commission of Utah of motor carriers for hire. Such carriers are divided into two classes, namely, common motor carriers and contract motor carriers. Section 54-6-1, Utah Code Annotated 1953, defines common motor carrier of property as follows (the definition of common motor carrier of passengers is the same, except that the term "passengers" is used instead of "property"):

> "'Common motor carrier of property' means any person who holds himself out to the public as willing to undertake for hire to transport by motor vehicle from place to place, the property of others who may choose to employ him."

And contract motor carrier of property is defined as follows (the definition of contract motor carrier of passengers is the same, except the term "passengers" is used instead of "property"):

> "'Contract motor carrier of property' means any person engaged in the transportation by motor vehicle of property for hire and not included in the term common motor carrier of property as hereinbefore defined."

Common motor carriers are required to obtain a certificate of convenience and necessity from the Public Service Commission and contract motor carriers are required to obtain a permit from the commission before they are permitted to do business. Motor carriers are not taxed

under the Utah Motor Carrier Act for their operation on the highways.

Section 54-6-12, Utah Code Annotated 1953, exempts certain motor carriers from a portion of the provisions of the Utah Motor Carrier Act. For the convenience of the court, this section is set out in full below with emphasis added to indicate exclusions:

> 54-6-12. "Except for the provisions of 54-6-17 relative to requirements of insurance, 54-6-21 relative to safety regulations, and 54-6-22 relative to accident report no portion of this act shall apply:
>
> "(a) To motor vehicles when engaged exclusively in transporting *students or their instructors* to or from school or to or from school activities, the word 'school' to be construed to mean a place or structure in which the annual winter or summer elementary,, collegiate, university or religious instruction is carried on; or
>
> "(b) To motor vehicles when used exclusively in carrying the *United States mail* under contract with the federal government or;
>
> "(c) To motor vehicles when the cargo consists exclusively of *livestock, farm, orchard, or dairy products* which are being transported between farm, orchard or dairy and a market, warehouse, creamery or processing plant; or exclusively of *farm or dairy supplies* used in or about the farm or dairy; or exclusively of *coal, lumber or logs* which are being transported from mine or forest to shipping point or market; or
>
> "(d) To motor vehicles when owned or operated by any duly organized *agriculture cooperat-*

ive association and used exclusively in the carrying on of its legally authorized non-profit activities; or

"(e) To motor vehicles used exclusively in the distribution of *newspapers* from the publisher to subscribers or distributors; or

"(f) To motor vehicles when especially constructed for *towing, wrecking, maintenance, or repair purposes,* and not otherwise used in transporting goods and merchandise for compensation; or when constructed as *armored cars* and used for safe conveyance or delivery of money or other valuables, or when used as *hearses, ambulances, or licensed taxicabs,* operating within a fifteen mile radius of the limits of any city or town; or to motor vehicles used as ambulances or hearses by any person, firm or corporation duly licensed in the state as an embalmer, funeral director, or as a mortuary establishment, provided that use of such motor vehicles as an ambulance shall be incidental to the use of embalming or funeral directing.

"(g) To a group of *employees riding together* in the automobile of a fellow employee to and from their employment and sharing the actual expenses of the transportation; provided that said group of employees shall not exceed 5 persons, in addition to the driver of the vehicle, and in no event to exceed 3 persons in any one seat, and provided further that this subsection shall not apply to any individual so operating in excess of one motor vehicle.

"It shall be unlawful for any vehicle which is operated under any of said exempt classes to be operated upon the public highways of this state, for hire, without a public liability policy in an amount not less than $20,000.00 for personal injuries to or death of one person, or less than $40,000.00 for injuries to or death of more than one person; and for

damage to property of any person other than the assured in an amount not less than $10,000.00 for liability arising out of the operation of said vehicle for hire; without maintaining said vehicle and all parts thereof in a safe condition at all times and without reporting every accident arising from or in connection with the operation of such vehicle as required by law or to be operated for any uses or purposes not falling within said exempt classes, except in accordance with the provisions of this act.

"The commission shall have power and authority to prescribe such reasonable rules and regulations to carry out the purposes of this act as may be deemed necessary including the establishing of reasonable fees for registration and each annual renewal thereof of exempt carriers and for the services performed by the commission.

"The commission is vested with power and authority and it shall be its duty to supervise and regulate all motor carriers as excepted above in accordance with these rules and regulations and with the provisions of this section and all carriers now operating under the provisions of this section shall make application to register their operation with the public service commission on or before July 1, 1957, and thereafter each carrier commencing operations under this section shall apply for registration as provided herein within 30 days immediately after said operation.

"A violation of this section or of the rules established pursuant thereto shall constitute an unlawful act and shall be punishable in the same manner and to the same extent as provided for in this act for non-exempt carriers."

The sole question presented to this court is whether or not the above exemptions discriminate against non-ex-

empt motor carriers to the extent that they are repugnant to Amendment XIV of the Constitution of the United States of America.

THE QUESTION IS SO UNSUBSTANTIAL AS TO NOT NEED FURTHER ARGUMENT.

The basis upon which appellee maintains that the question presented is so unsubstantial as to not need further argument, is that this court in previous decisions has decided the question and has upheld the constitutionality of other state laws containing exemptions almost identical with those in the Utah law.

Appellant relies principally upon this court's decision in *Smith* v. *Cahoon*, 283 U. S. 553, 75 L. Ed. 1264, wherein the Florida Motor Carrier Act was held to be unconstitutional. That act completely excluded from regulation the following motor carrier operations:

> "• • • corporations or persons engaged exclusively in the transportation of children to or from school, or any transportation company engaged exclusively in the transporting agricultural, horticultural, dairy, or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point enroute to primary market or to motor vehicles used exclusively in transporting or delivering dairy products or any transportation company engaged in operating taxicabs, or hotel busses from a depot to a hotel in the same town or city." (283 U. S. page 557.)

There are important distinguishing features between the Utah Motor Carrier Act and the Florida statute as it

was at the time of the *Smith* v. *Cahoon* decision. They are as follows:

FLORIDA MOTOR CARRIER ACT AT TIME OF SMITH v. CAHOON

1. Statute made no distinction between a common carrier and a contract carrier. It required a tariff from every auto transportation company.

2. The exempt carriers were not required to give a bond or insurance policy for the protection of the public.

3. The exempt carriers were not bound by any safety regulations.

PRESENT UTAH MOTOR CARRIER ACT

1. Distinguishes between "common motor carrier of property" and "contract motor carrier of property." (Section 54-6-1, Utah Code Annotated 1953.)

2. Requires exempt carriers to furnish public liability insurance. (Section 54-6-12, Utah Code Annotated 1953, as amended by Chapter 107, Section 1, Laws of 1957.)

3. Requires exempt carriers to maintain vehicles in a safe condition (Section 54-6-12, Utah Code Annotated 1953, as amended by Chapter 107, Section 1, Laws of 1957) and to maintain safe conditions at all time and be subject to inspection by the commission. (Section 54-6-21 of Utah Code Annotated 1953.)

In *Smith* v. *Cahoon* the court first commented upon failure of the Florida statutes to distinguish between com-

mon carriers and a private or contract carrier such as Mr. Smith. 283 U. S. page 561. Under the Utah statutes, Smith would be a contract carrier. This failure of the Florida statutes to distinguish between common and contract carriers of property was one basis for the court's holding the Florida Act unconstitutional as the court said:

> "The statute on its face makes no distinction between common carriers and a private carrier such as the appellant. * * * All carriers within the act, whether public or private, are put by the terms of the statute upon precisely the same footing. All must obtain certificates of public convenience and necessity upon like application and conditions. It is true that the statute does not in express terms demand that a private carrier shall constitute itself a common carrier, but the statute purports to subject all the carriers which are within the terms of its definition to the same obligations. Such a scheme of regulation of the business of a private carrier, such as the appellant, is manifestly beyond the power of the state." (L. 83, U. S., page 563.)

It is obvious that this basis for the decision in *Smith* v. *Cahoon* would not apply to the matter before the court. The Utah law distinguishes between common motor carriers and contract or private motor carriers and does not purport to subject all carriers to the same obligations, which would be beyond the power of the state.

The second basis for holding the Florida Act unconstitutional in *Smith* v. *Cahoon* was that of an unconstitutional discrimination. It appears to appellees that the rationale of the second objection was that there was no rea-

son to exempt any motor carriers conducting a business upon the highways from safety requirements. This was stated by the court as follows:

> "In determining what is within the range of discretion and what is arbitrary, regard must be had to the particular subject of the state's action. In the present instance, the regulation as to the giving of a bond or insurance policy to protect the public generally, in order to be sustained, must be deemed to relate to the public safety. This is a matter of grave concern as the highways become increasingly crowded with motor vehicles, and we entertain no doubt of the power of the state to insist upon suitable protection for the public against injuries through the operations on its highways of carriers for hire, whether they are common carriers or private carriers. But in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary and constituted a violation of the appellant's constitutional right. 'Such a classification is not based on anything having relation to the purpose for which it is made'." (283 U. S., Page 567.)

The Utah Motor Carrier Act, as distinguished from the Florida Act, does not exempt any motor carrier for hire

insofar as public safety is concerned. The pertinent portion of Section 54-6-12, Utah Code Annotated 1953, provides:

> "Except for the provisions of Section 54-6-17, relative to requirements of insurance, 54-6-21 relative to safety regulations and 54-6-22, relative to accident report no portion of this act shall apply. * * *" (listed exemptions)

And Section 54-6-21, Utah Code Annotated 1953, provides:

> "Every motor vehicle and parts thereof shall be maintained in a safe condition at all times and shall be at all times subject to inspection by the commission or its duly authorized representatives."

And Section 54-6-22, Utah Code Annotated 1953, provides:

> "Every accident arising from or in connection with, the operation of any motor vehicle to which this act applies shall be reported to the commission in such detail and in such manner as the commission may require."

Furthermore, the Utah Motor Carrier Act does not remove the exempt carriers from the jurisdiction of the Public Service Commission. Section 54-6-12, Utah Code Annotated 1953, which is set out in full on pages 3, 4 and 5 of this motion provides that, in addition to safety and insurance requirements, the commission shall have authority to prescribe reasonable regulations to carry out the purposes of the act as it pertains to exempt motor carriers, that it shall be the duty of the commission to supervise and regulate exempt motor carriers, and that all exempt motor carriers shall register with the Public Service Commission.

Appellant, on page 7 of its Jurisdictional Statement, contends that the Utah Act is discriminatory because it does not require exempt carriers to obtain a certificate from the Public Service Commission. Under the Utah Act, a contract motor carrier is not required to obtain a "certificate" either—he must obtain a "permit". Exempt carriers obtain neither, but they are required to register with the commission. We think that the court in *Smith* v. *Cahoon* did not use the word "certificate" in any technical sense but that what the court said was that the legislature cannot relieve the exempt carriers from all control of the regulatory body and the requirements of safety and security, otherwise such a classification would have no relation to the purpose for which it was made. Under the Utah Act, the exempt carriers "register" with the Public Service Commission and are subject to such regulations as the commission may adopt. (Section 54-6-12, Utah Code Annotated 1953.)

From the foregoing, it appears that the Utah Motor Carrier Act is clearly distinguishable from the Florida Act which was under consideration in *Smith* v. *Cahoon* and that it contains none of the features the court found objectionable in *Smith* v. *Cahoon*.

It is interesting to note that following the *Smith* v. *Cahoon* decision the Florida Motor Carrier Act was amended and provisions relating to safety and security for the exempt carriers were added. The constitutionality of the act was again drawn in question on the ground that

the exemptions were discriminatory and the Florida Supreme Court found the act constitutional. *Riley* v. *Lawson*, 106 Fla. 521, 143 So. 619.

Without reciting from each of the several cases subsequent to the *Smith* v. *Cahoon* decision in which this court has upheld the constitutionality of exemptions similar to those in the Utah Motor Carrier Act, and with which this court is familiar, the following quotation from *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission et al.*, 295 U. S. 285, 79 L. Ed. 1439, is an appropriate summary:

> "*Smith* v. *Cahoon* has been considered in later cases in this court, and the limits of its holding, clear enough at the beginning, have been brought out in sharp relief. Thus, in *Continental Baking Co.* v. *Woodring*, supra, at p. 371, (286 U. S. 371, 76 L. Ed. 1166, 52 S. Ct. 595, 81 A. L. R. 1402) which came here from the State of Kansas, exemption from various forms of regulation, including the payment of a tax, was accorded to 'the transportation of livestock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle.' The exemtpion was upheld. Again, in *Hicklin* v. *Covey*, supra, at p. 175, (290 U. S. 175, 78 L. Ed. 251, 54 S. Ct. 142) a statute of South Carolina gave exemption to 'farmers or dairymen, hauling dairy or farm products; or lumber haulers engaged in transporting lumber or logs from the forests to the shipping points.' The exemption was interpreted by the highest court of the state as limited to cases where the hauling was irregular or occasional and not as a regular business. We upheld the statute as thus interpreted though the effect was to relieve from the filing of a bond.

> "These cases and others like them (*American Sugar Ref. Co.* v. *Louisiana*, 179 U. S. 89, 45 L. Ed. 102, 21 S. Ct. 43) are illustrations of the familiar doctrine that a legislature has a wide discretion in the classification of trades and occupations for the purpose of taxation and in the allowance of exemptions and deductions within reasonable limits."

In addition to the cases cited in the above quotation, also see *Sproles* v. *Binford*, 286 U. S. 374, 391, 394, 76 L. Ed. 1167.

In *McGowan* v. *Maryland*, 366 U. S. 420, 425; 6 L. Ed. 2d 393, 399, this court said in sustaining classifications under the Sunday Closing Law of the State of Maryland:

> "* * * Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. * * *"

The exemption of certain motor carriers from portions of the Utah Motor Carrier Act is consonent with the purposes and objectives of the act. As was stated by the Utah Supreme Court in the last paragraph of its judgment in this case (15 Utah 2d 139, 389 P. 2d 57, 60):

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> "We have given careful consideration to classes of transportation exempted under 54-6-12 and conclude that in each instance the classification is reasonable. For the most part, the transportation exempted is casual, seasonal, slow-moving, not on regular routes or schedules, frequently in special equipment, and for comparatively short distances. Each of the exemptions have been held reasonable by other courts."

At one time or another, practically all of the exemptions found in the Utah Motor Carrier Act have been sustained by the courts of other states. Appendix A of this motion lists such decisions.

CONCLUSION

The question presented by the appeal in this matter is so unsubstantial as to not need further argument and the appeal should be dismissed.

Respectfully submitted,

A. PRATT KESLER,
Attorney General,

H. WRIGHT VOLKER,
Assistant Attorney General,

KEITH E. SOHM,
Commerce Attorney,

Attorneys for Public Service Commission of Utah and its Commissioners.

APPENDIX A

CASES IN WHICH EXEMPTIONS SIMILAR TO THOSE IN THE UTAH MOTOR CARRIER ACT HAVE BEEN SUSTAINED.

Transportation of Children and Instructors to School:

Continental Baking Co. v. Woodring, 286 U. S. 352, 76 L. Ed. 1155

Ex Parte Iratacable, 55 Nev. 263, 30 P. 2d 284

Riley v. Lawson, 106 Fla. 521, 143 So. 619

Kelly v. Finney, 207 Ind. 557, 194 N. E. 157

Vehicles Carrying United States Mail:

Kelly v. Finney, supra

Public Service Commission of Wyoming v. Grimshaw, 53 P. 2d 1, 109 A. L. R. 534

Vehicles Transporting Livestock and Farm Dairy Products:

Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U. S. 285, 29 L. Ed. 1439

Schwartzman Service v. Stahl (Mo. 1932), 60 F. 2d 1034

Figenshaw v. McCoy (N. D.), 256 N. W. 259

State, ex rel. Wisconsin Allied Truck Owners Association v. Public Service Commission, 207 Wis. 664, 242 N. W. 668

Riley v. Lawson, supra

Vehicles Transporting Logs:

Hicklin v. Covey, 290 U. S. 169, 78 L. Ed. 247

Anderson v. Thomas, Commissioner of Public Utilities, (Ore.), 26 P. 2d 60

State v. King (Me.), 188 A. 775

Vehicles Operated by Agriculture Cooperative Associations:

Kelly v. Finney, supra

Baker v. Glenn, State Tax Commissioner of Kentucky, 2 F. Supp. 880

Vehicles Used in Exclusive Transportation of Newspapers:

Kelly v. Finney, supra

Schwartzman Service v. Stahl, supra

State v. King, supra

Hearses, Ambulances, Taxicabs:

Ex Parte Iratacable, supra

Bacon Service Corporation v. Huss, 199 Cal. 21, 248 P. 235

PROOF OF SERVICE

I, A. Pratt Kesler, Attorney General of the State of Utal., Attorney for Public Service Commission of Utah and its Commissioners, Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 25 day of July, 1964, I served copies of the foregoing Motion to Dismiss on behalf of Appellees on the several parties thereto, as follows:

1. On Wycoff Company, Incorporated, by mailing a copy in a duly addressed envelope, with first-class postage prepaid, to Wayne C. Durham, its Attorney, 428 American Oil Building, Salt Lake City, Utah.

2. On the Utah Motor Transport Association, by mailing a copy in a duly addressed envelope, with first-class postage prepaid, to Richards, Bird and Hart, its attorneys, 716 Newhouse Building, Salt Lake City, Utah.

A. Pratt Kesler

A. PRATT KESLER,
Attorney General.

236 State Capitol
Salt Lake City, Utah